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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

TERRY CLAY WILLIAMS,

Defendant and Appellant.

2d Crim. No. B286613
(Super. Ct. No. TA143205)
(Los Angeles County)

Count 2 of an amended information charged appellant Terry Clay Williams with an assault on the person of Darrin Wesley by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)).¹ Count 5 charged appellant with a violation of section 245, subdivision (a)(4) as to another victim, Luevette Carter. Both counts alleged the infliction of great bodily injury within the meaning of section 12022.7, subdivision (a).

¹ All further statutory references are to the Penal Code.

Count 6 charged appellant with assault with a firearm (§ 245, subd. (a)(2)) as to Wesley. Count 7 charged appellant with another violation of section 245, subdivision (a)(2) as to Carter. Both counts alleged that appellant personally used a firearm within the meaning of section 12022.5.

The amended information also alleged appellant's prior conviction of a serious felony pursuant to the Three Strikes Law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The prior felony was an assault with a deadly weapon (§ 245, subd. (a)) committed in 2002.

The jury convicted appellant of the two Wesley counts and found the firearm use allegation to be true. It acquitted him of the Carter counts. Appellant admitted the prior strike and the trial court denied his *Romero*² motion. He was sentenced on count 6 to the low base term of two years, doubled for the strike, plus four years for the section 12022.5 enhancement, for an aggregate prison term of eight years. The court stayed the sentence on count 2 pursuant to section 654.

Appellant contends (1) there was insufficient evidence to convict him of assault with a firearm, (2) the trial court erroneously instructed the jury regarding defense counsel's untimely disclosure of evidence, (3) the court erroneously failed to sua sponte instruct the jury on self defense, (4) the court improperly sustained an objection to defense counsel's closing argument, (5) there was cumulative error and (6) the court erred by denying appellant's *Romero* motion to dismiss the prior strike. We affirm.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

FACTS

Wesley and his friend Willie Edwards were at a bowling alley late in the evening on February 25, 2017. Appellant approached Wesley and Edwards. Wesley had known appellant for a number of years, and appellant apparently was upset because Wesley was friendly with appellant's former girlfriend, Donna Smith. Appellant asked Wesley and Edwards to "go outside," saying "You know what this is all about." After appellant grabbed Edwards, security guards escorted appellant out of the building.

In the early hours of February 26, 2017, Wesley and Edwards went to Wesley's home, where Carter was waiting in her car to pick up Edwards. Wesley stood by the driver's side door of the car, while Carter was in the driver's seat and Edwards was in the passenger seat.

Appellant pulled up in his car. He got out of his car and approached Wesley "with a gun out." Carter saw the gun from her position in the driver's seat and started screaming. Appellant pointed the gun at Wesley's head and said, "You know what this is all about." Wesley responded that he did not know what appellant was talking about. Appellant struck Wesley in the head twice with the handgun, causing Wesley to fall to the ground. Before leaving, appellant struck Wesley another three times with the gun and stomped on his right ankle. Wesley felt a lot of pain in his head and ankle, was bleeding badly, and was "dazed."

Wesley remained on the ground for approximately three minutes. He then got up with Edwards's assistance. Wesley kept stumbling as he tried to make it back to his house. In the meantime, appellant returned and began yelling outside the

residence of Smith, who was Wesley's neighbor. Appellant was kicking at the door and yelling that Smith was "no good" and a "bitch." Appellant then left again. Appellant had previously complained that Wesley was spending too much time with Smith.

After appellant approached with the gun, Carter ran to Wesley's house and called 911. She told the dispatcher that a man "pulled a gun" and "beat him up." Carter said, "I was in the driver's seat and I saw him with the gun, and he started beating on him." She was nervous and afraid.

Wesley suffered head wounds and ankle pain, but did not seek medical treatment. He self-treated with over-the-counter pain medication, bandages and alcohol. Due to the pain, Wesley could not work for approximately two and a half weeks and had to hire someone to assist in caring for his mother.

Appellant was arrested about two and a half months after the incident. Officers searched his home but did not find a gun.

Appellant's fiancée, Treraza McDaniel, was the only defense witness. She testified in support of a "mutual combat" defense. McDaniel, who was living with appellant, went to the bowling alley with him on February 25, 2017. She saw two men looking at appellant. Appellant walked over and talked to the men. Appellant then suggested that he and McDaniel leave, and they went home together early on February 26, 2017. Appellant left the house, saying he would be right back, and McDaniel went to sleep. When appellant returned home he had a bloody lip, a black eye and bruises on his face. Appellant said he had gotten into a fist fight and could not "believe this happened." McDaniel took two pictures of appellant's face.

DISCUSSION

Substantial Evidence Supports the Conviction for Assault With a Firearm

Appellant contends insufficient evidence was presented to support his conviction for assault with a firearm (count 6). In deciding this claim, “we view the entire record in the light most favorable to the judgment and determine whether it discloses substantial evidence -- i.e., evidence that is reasonable, credible, and of solid value -- to support the jury's finding.” (*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1398, fn. omitted; *People v. Clark* (2000) 82 Cal.App.4th 1072, 1082-1083.) We cannot reweigh the evidence or substitute our decision for that of the trier of fact. (*Clark*, at p. 1083.) “Unless it is clearly shown that ‘on no hypothesis whatever is there sufficient substantial evidence to support the verdict’ the conviction will not be reversed. [Citation.]” (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.)

Appellant concedes that pointing a loaded gun at the victim may constitute assault with a firearm (§ 245, subd. (a)(2)) even if no attempt is made to fire the weapon. (See *People v. Miceli* (2002) 104 Cal.App.4th 256, 268-269). He argues, however, that there is no credible evidence that appellant pointed a gun at anyone. We disagree.

Wesley testified that appellant “had a gun to my head.” Because witness credibility is not weighed on appeal, this evidence alone would permit a reasonable trier of fact to find that the gun was pointed at Wesley.

Appellant also argues the conviction cannot stand because there is no evidence the gun was loaded. It is true that an assault with a firearm generally “cannot be committed with an

unloaded gun,” but there is an exception when the weapon is used as a club or bludgeon. (*People v. Chance* (2008) 44 Cal.4th 1164, 1172, fn. 7.) Substantial evidence supports a finding that appellant used the gun as a bludgeon to strike Wesley on the head several times. Not only did Wesley testify to this fact, but Carter also informed the police dispatcher during the 911 call that appellant had a gun and was beating on Wesley, whom she described as her boyfriend’s friend.

In addition, an unloaded gun may support a conviction for assault with a firearm if the defendant’s conduct and threatening language would cause a reasonable fact-finder to conclude that the gun was loaded and that the defendant had the present ability to shoot the victim. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 12 [“California courts have often held that a defendant’s statements and behavior, while making an armed threat against a victim may warrant a jury’s finding the weapon was loaded”].) That evidence is present here. Appellant displayed the gun in order to threaten Wesley, saying that they “all can get it.” Carter testified that when she left her car and went into Wesley’s yard, she was “thinking I’m gonna hear gunshots.” A jury could reasonably conclude from appellant’s threatening and menacing behavior that his gun was loaded and that he had the present ability to shoot Wesley.

The Trial Court Properly Instructed the Jury

Regarding the Untimely Disclosure of Evidence

Defense counsel is required to disclose all persons expected to testify at trial other than the defendant at least 30 days prior to trial unless good cause, such as threats to a witness, is shown. (§§ 1054.3, subd. (a), 1054.7.) If the defendant violates this rule and the prosecution complies, the “court may make any order

necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.” (§ 1054.5, subd. (b).)

Appellant called McDaniel to testify after the prosecution had rested, without giving advance notice to either the trial court or the prosecution. The court was inclined to not allow McDaniel to testify because the prosecution had not had an opportunity to take her statement. Ultimately, the court allowed the testimony, but instructed the jury with CALCRIM 306, the instruction regarding untimely disclosure of evidence. It found the prosecution was prejudiced by the late disclosure because there was no opportunity to fully investigate McDaniel. Over the defense’s objection, the court instructed as follows: “Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. The defense failed to disclose witness McDaniel within the legal time period. In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure. However, the fact that the defense failed to disclose evidence within the legal time period is not evidence that the defendant committed a crime.”

Appellant contends the trial court committed reversible error by instructing the jury with CALCRIM 306. He claims the instruction is similar to the one criticized in *People v. Bell* (2004)

118 Cal.App.4th 249, 257. But the instruction in that case (CALJIC 2.28) was an earlier standard instruction that has since been superseded by CALCRIM 306. Part of the problem in *Bell*, which does not exist here, was that the instruction referred to “the defendant” when it was not the defendant himself but defense counsel who was responsible for the untimely discovery. (*Bell*, at pp. 254-255.) Additionally, the instruction in *Bell* informed the jury that the “weight and significance of any delayed disclosure” were matters for its consideration, but gave the jury no guidance on how to evaluate the weight and significance of the discovery violation. (*Ibid.*) In contrast, CALCRIM No. 306 directed the jury that in evaluating the weight and significance of the evidence, it should consider the “effect, if any” of the late disclosure. The instruction explained that the effect of the late disclosure might “deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.”

As the People point out, the trial court’s use of CALCRIM 306 did not diminish the People’s duty to prove appellant guilty beyond a reasonable doubt. The court instructed the jury that “the fact that the defense failed to disclose evidence within the legal time period is not evidence that the defendant committed a crime.” The instruction did not imply that appellant was responsible for the late disclosure, and it explicitly admonished the jury that the violation was not evidence of appellant’s guilt. Appellant has not demonstrated that the court abused its discretion by giving the instruction. (See *People v. Lamb* (2006) 136 Cal.App.4th 575, 581.)

*The Trial Court Had No Sua Sponte Duty to
Instruct the Jury on Self Defense*

Appellant argues that the trial court had a duty to sua sponte instruct the jury on self defense. The People correctly respond there was no such duty because substantial evidence did not support that defense.

A trial court has a sua sponte duty to instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. (*People v. Brooks* (2017) 3 Cal.5th 1, 73; accord *People v. Diaz* (2015) 60 Cal.4th 1176, 1189.) "It is also well settled that this duty to instruct extends to defenses 'if it appears . . . the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*Brooks*, at p. 73; see *People v. Salas* (2006) 37 Cal.4th 967, 982 [no right to instruction on affirmative defense unsupported by substantial evidence].) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.'" (*Salas*, at p. 982.)

"To justify an act of self-defense for [an assault charge under . . . section 245], the defendant must have an honest and reasonable belief that bodily injury is about to be inflicted on him. [Citation.]' [Citation.] The threat of bodily injury must be imminent [citation] and ' . . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances.'" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065, italics)

omitted; see *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083.)

We conclude the record is devoid of any substantial evidence to warrant a self-defense instruction. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1145.) The record establishes that appellant confronted Wesley with a gun and started beating Wesley with it. There is no evidence of any provocation by Wesley.

McDaniel's testimony that appellant came home with injuries to his face is not substantial evidence that appellant acted in self defense. McDaniel did not testify that appellant acted in self defense, and she did not witness the altercation. At best, her evidence suggests appellant had a struggle with someone. That mere suggestion is insufficient to require a sua sponte instruction on self defense. Moreover, it is not reasonably probable, given the totality of the evidence, that appellant would have received a more favorable result had the instruction been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

*The Trial Court Properly Sustained the Objection to
Defense Counsel's Closing Argument*

During closing argument, defense counsel asked that "each and every one of you [jurors] step into [appellant's] shoes and argue on his behalf." Counsel requested that the jurors "speak on [appellant's] behalf," if the prosecutor raised something in rebuttal that appellant's counsel had missed. The trial court sustained the prosecutor's objection to this argument, reminding the jurors they are not advocates.

Appellant contends the trial court's sustaining of the objection denied him his right to counsel "because counsel's

ability to assist appellant [was] eliminated during a critical stage.” We are not persuaded.

“A criminal defendant has a well-established constitutional right to have counsel present closing argument to the trier of fact. [Citations.]” (*People v. Marshall* (1996) 13 Cal.4th 799, 854.) Although the defense is given wide latitude in closing argument, the trial court has a duty to prevent improper argument. (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1388.) The court’s rulings concerning the scope of argument are reviewed for abuse of discretion. (*Herring v. New York* (1975) 422 U.S. 853, 862 [45 L.Ed.2d 593, 600]; *People v. Kimball* (1936) 5 Cal.2d 608, 611.)

Here, the jury was appropriately instructed with CALCRIM No. 3550, which advises, in part, that the jury’s role “is to be an impartial judge of the facts, not to act as an advocate for one side or the other.” During his closing argument, defense counsel asked the jury to deviate from this role and to argue on appellant’s behalf. This was improper and contrary to the trial court’s instructions. The court did not abuse its discretion by sustaining the prosecutor’s objection.

No Cumulative Error

Appellant contends the cumulative effect of the alleged errors denied him a fair trial. As we have found no error, “there is nothing to cumulate and hence there can be no cumulative prejudice.” (*People v. Grimes* (2016) 1 Cal.5th 698, 737.)

The Trial Court Did Not Abuse Its Discretion by Denying the Motion to Dismiss the Strike

Appellant argues the trial court’s denial of his *Romero* motion to dismiss the prior strike constituted error because appellant falls outside the spirit of the Three Strikes Law and because the court failed to give full mitigating weight to the fact

that appellant was 21 years old at the time he committed the prior strike. Both arguments lack merit.

“As the Supreme Court explained in *Romero*, section 1385 permits a trial court to strike an allegation of a prior felony conviction in cases brought under the Three Strikes law, in the interests of justice.” (*People v. Thimmes* (2006) 138 Cal.App.4th 1207, 1213, citing *Romero, supra*, 13 Cal.4th at pp. 529-530.) “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation . . . the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).) The court’s decision not to strike a prior conviction allegation is reviewed under the abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 371.)

Appellant asserted that he fell outside the spirit of the Three Strikes Law because he was employed and had a supportive family. He further noted that his prior conviction was 15 years old and that he had not had any additional violent felonies. The prosecutor responded that the strike, which was for assault with a deadly weapon, was based on the same conduct as the current offenses. The prosecutor also observed that appellant was convicted of disorderly conduct (§ 647, subd. (f)) in 2007 and of misdemeanor battery (§ 242) in 2015, and that appellant was still on probation for the battery at the time of the current offenses. The trial court found that even though the strike was

15 years old, it involved “similar-type conduct” and, as a result, declined to exercise its discretion to dismiss the strike.

As the People note, the nature and circumstances of appellant’s convictions demonstrate his willingness to act violently. Appellant’s prior strike conviction involved an attack on four people with a knife, in which three were injured. The current convictions are based on appellant’s unprovoked assault on Wesley with a handgun in the middle of the night. And in between his strikes, appellant was convicted of disorderly conduct and battery. This is not the type of behavior that suggests appellant falls outside the spirit of the Three Strikes Law.

Moreover, the fact that appellant was 21 years old when he committed his first strike is “not significant.” (*Williams, supra*, 17 Cal.4th at p. 163.) Appellant’s reliance upon authorities involving juvenile offenders is misplaced because he was not a juvenile at the time of his prior strike. Appellant has not demonstrated that the trial court’s denial of his *Romero* motion was an abuse of discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

John J. Lonergan, Judge
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